

75-1905
IN THE

Supreme Court, U.S.
FILED
JUL 1 1976

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

ERNEST R. MULLENAX, PETITIONER,

—v.—

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

ROSENBERG, ROSENBERG, EHRLICH
& SCHUMINSKY,
Attorneys for Petitioner,
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530
Tel. No. 516-248-4300.

JOSEPH B. EHRLICH,
MARC A. ROSENBERG,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Rule Involved	3
Statement	4
Reasons for Granting the Writ	6
Conclusion	13

CITATIONS

Cases:

<i>Bellah v. First National Bank</i> , 495 F.2d 1109 (5th Cir. 1974)	7
<i>Bland v. United States</i> , 299 F.2d 105 (5th Cir. 1962)	9
<i>C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc.</i> , 508 F.2d 1354 (7th Cir. 1975)	7
<i>Grenader v. Spitz</i> , Dkt. No. 75-7592 (2d Cir. April 28, 1976), slip op. 3485	7, 8
<i>Haymes v. Regan</i> , 525 F.2d 540 (2d Cir. 1975)	12
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972) ...	2, 10
<i>Lino v. City Investing</i> , 487 F.2d 689 (3d Cir. 1973)	7
<i>McClure v. First National Bank of Lubbock</i> , 497 F.2d 490 (5th Cir. 1974), cert. denied, 420 U.S. 930 (1975)	6, 8
<i>United Housing Foundation, Inc. v. Forman</i> , 421 U.S. 837 (1975)	6, 7, 8

	PAGE
<i>United States v. Blitz</i> , Dkt. No. 75-1237 (2d Cir. March 25, 1976), slip op. 2761	11, 12
<i>United States v. Boerner</i> , 508 F.2d 1064 (5th Cir. 1975)	10
<i>United States v. Bolden</i> , 514 F.2d 1301 (D.C. Cir. 1975)	10
<i>United States v. Boyd</i> , 404 F. Supp. 413 (S.D.N.Y. 1975)	10
<i>United States v. DeMarco</i> , 488 F.2d 828 (2d Cir. 1973)	11
<i>United States v. Gentile</i> , 530 F.2d 461 (2d Cir. 1976)	6, 7
<i>United States v. Harris</i> , 388 F.2d 373 (7th Cir. 1967)	10
<i>United States v. Hines</i> , 256 F.2d 561 (2d Cir. 1958)	11
<i>United States v. Mancuso</i> , 485 F.2d 275 (2d Cir. 1973)	11
<i>United States v. Mapp</i> , 476 F.2d 67 (2d Cir. 1973)	11
<i>United States v. Rizzo</i> , 491 F.2d 1235 (2d Cir. 1974)	11
<i>United States v. Slutsky</i> , 514 F.2d 1222 (2d Cir. 1975)	11
<i>United States v. Sperling</i> , 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975)	11
<i>Statutes:</i>	
11 U.S.C. § 25(a)(10)	11
15 U.S.C. § 77e	4
15 U.S.C. § 77q	4
15 U.S.C. § 77x	4

	PAGE
18 U.S.C. § 1001	4
18 U.S.C. § 1341	4
18 U.S.C. § 1343	4
28 U.S.C. § 1254(1)	2
<i>United States Constitution:</i>	
Fifth Amendment	3, 11

OTHER AUTHORITIES

Bankruptcy Act, Section 7a(10)	3
--------------------------------------	---

IN THE
Supreme Court of the United States
October Term, 1975

ERNEST R. MULLENAX, *Petitioner*,
—v.—

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

Ernest R. Mullenax petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The memorandum order of the court of appeals is not reported. It is reproduced as Appendix A. The judgment of the District Court, dated December 2, 1975, which was affirmed in part and modified in part by the court of appeals is reproduced as Appendix B. The opinion of the District Court, dated November 28, 1975, denying petitioner Mullenax's motion for *Kastigar* hearings and related relief, is reported at 404 F. Supp. 413, and is reproduced as Appendix C. The court of appeals denial of Mullenax's petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix D.

Jurisdiction

The judgment of the court of appeals was entered on April 15, 1976. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the pledge of stock to a bank or other money lending institution as collateral for a loan, or the pledge of stock as additional collateral for an existing loan, constitutes a securities transaction within the meaning of the Securities Act of 1933?

2. When a jury after retiring to deliberate requests the trial court to forward copies of the substantive statutes, upon which criminal charges have been lodged, must the trial court reinstruct the jury as to all the elements of the offenses when the statutes do not embody all the requisite elements of the offenses, namely, the elements of knowledge, willfulness and intent?

3. Whether a trial court is mandated to give a criminal defendant hearings pursuant to the authority of *Kastigar v. United States*, 406 U.S. 441 (1972), when it is shown that the criminal defendant prior to the handing down of the criminal indictment against him gave testimony at the first meeting of creditors in his bankruptcy proceedings, which testimony related to the charges set forth against him in the subsequent criminal indictment?

4. When an appellate court reverses an appellant's conviction as to a material number of counts upon which he stood criminally convicted, is the appellate court obliged to remand appellant's case to the sentencing court

to allow reconsideration of the sentence originally imposed?

5. Where a criminal defendant's appeal to a United States Court of Appeals rests on points of law which to a significant degree are supported by law and precedent in other circuit courts of appeals, must the appellate court in affirming the defendant's conviction set forth with some degree of specificity the grounds and essential facts surrounding the affirmance?

Constitutional Provision and Rule Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

"... nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Section 7a(10) of the Bankruptcy Act provides in pertinent part:

"The bankrupt shall . . . at the first meeting his creditors . . . submit to an examination concerning the conducting of his business, the course of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may effect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding. . . ."

Statement

Ernest R. Mullenax's connection with the wide spectrum of criminal allegations and charges contained in Indictment 75 Cr. 140 * filed February 10, 1975, in the United States District Court for the Southern District of New York, was in regard to the pledge of stock in Select Enterprises, Inc. ("Select") with reference to loan transactions.** In May and July, 1970, petitioner

* The indictment charged sixteen defendants in fifty-three counts with direct violation of 18 U.S.C. §§ 1001, 1341, 1343 and 15 U.S.C. §§ 77e, 77q and 77x and with conspiracy to commit the aforesaid offenses.

** The bulk of the testimony of some forty witnesses called by the prosecution at trial related to the following criminal allegations and charges covering a period from in or about January, 1970, to April 12, 1970, which in no manner directly touched or were connected with the petitioner: (1) the purchase of stock in a dormant Nevada corporation by the name of Goldfield Candelaria; (2) its change of name to Select Enterprises, Inc.; (3) the placement of assets of questionable value into the company for the preparation and certification of a false statement as to the capital structure of Select; (4) the creation of an artificial market in the corporate stock by means of manipulation; (5) the mailing and making of false statements to the Securities and Exchange Commission. On or about April 12, 1970, after suspension of trading in Select stock for a ten-day period, the Securities and Exchange Commission permitted resumption of trading in the Select stock. On May 1, 1970, at the earliest, Mullenax first enters the wide spectrum of allegations and charges. Consequently, the United States Court of Appeals for the Second Circuit, with the concession of the Government, reversed forty-two counts of the fifty-one upon which Mullenax stood convicted after trial by jury (the jury acquitted Mullenax on counts fifty-two and fifty-three: the substantive offenses under 18 U.S.C. § 1001). What now remains is the conspiracy count and eight substantive counts, (two counts under 18 U.S.C. §§ 1341 and 1343; three counts under 15 U.S.C. §§ 77q and 77x; three counts under 15 U.S.C. §§ 77e and 77x) all of which relate to events after May 1, 1970.

placed Select stock as collateral for a \$60,000 and \$25,000 loan respectively at the State National Bank of Alabama and the Town & Country Business Trust.* Additionally, shares of stock in Select were placed by Mullenax in May, 1970, with the Home State Bank, as additional collateral for a then existing and outstanding loan (which loan, was renewed by the Home State Bank in January, 1969, a time prior to the period covered by the indictment). Mullenax had outstanding loans at other banks. There was no claim made that Select stock was pledged as collateral for such loans. Mullenax contended that there was absolutely no legally sufficient proof that he had knowledge of any fraud or criminal wrongdoing and that he was without specific intent to defraud. The Government contended that Mullenax made paybacks into the conspiracy, which assertion Mullenax strongly argued was not supported by the evidence. These facts are contained in Mullenax's brief to the United States Court of Appeals for the Second Circuit, but are not central to the points of law set out in the petition herein.

Consequently, the evidence at trial was that Mullenax presently remains legally liable for the loans at the above related banks and business trust. The evidence at trial showed that Mullenax's liability for the loans remained legally independent and apart from the placement of any stock of any company with reference to the loans.

* The Select stock used with reference to the loan at the business trust was not received by the business trust as the primary collateral.

Reasons for Granting the Writ

This Court in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), held that the purchase of shares of stock as a requisite to the purchaser's lease of an apartment in a housing cooperative was not a transaction under the purview of the federal securities laws. Specifically, the stock was not found to be "securities" embracing the federal remedial legislation: the Securities Act of 1933 or the Securities Exchange Act of 1934.

Petitioner Mullenax citing *United Housing Foundation, Inc. v. Forman*, *supra*, and *McClure v. First National Bank of Lubbock*, 497 F.2d 490 (5th Cir. 1974), cert. denied, 420 U.S. 930 (1975), argued that the use of stock in Select as collateral for loans and/or additional collateral for an existing loan were not acts or transactions which embraced the federal securities laws legislation, specifically the Securities Act of 1933. *McClure* held:

"[M]ere acceptance of a stock pledge as collateral in a privately negotiated transaction between borrower and lender does not, of itself, bring within the scope of the federal securities acts a transaction otherwise outside their purview (497 F.2d at 445)." *

The United States Court of Appeals for the Second Circuit openly holds to the contrary. *United States v. Gentile*, 530 F.2d 461, 466 (2d Cir. 1976). The Government in its brief to the Second Circuit relied exclusively on the *Gentile* case. *McClure's* reasoning, however, it is submitted, is in accord with the under-

* It is noted that the Select stock was never sold by the State National Bank of Alabama, the Home State Bank or the Town & Country Business Trust.

lying thinking of this Court's opinion in *Forman*, and moreover is in accord with a recent Second Circuit decision, which openly admits a shift of opinion in this area based on this Court's *Forman* decision. See *Grenader v. Spitz*, Dkt. No. 75-7592 (2d Cir. April 28, 1976) slip. op. 3485. *Gentile's* reasoning is apparently limited in view of the decision of this Court in *Forman* and the Second Circuit's recent opinion in *Grenader v. Spitz*, *supra*.

The evidence at trial clearly showed that the loan itself stood independent and apart from the placement of shares of stock in Select as collateral, in fact separate and free from the placement of stock in any particular company. Regardless of the collateral, the grantor of the loan, the banks and money lending institution could recover in full from the borrower. In fact, the evidence was that petitioner owes the remaining balance with interest to date.*

* See *C.N.S. Enterprises, Inc. v. G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir. 1975), where the court of appeals, in accord with the essential reasoning of this Court in *Forman*, holds that the paramount inquiry in determining whether a transaction falls within the ambit of the securities laws is the nature of transaction: the referred to "commercial-investment dichotomy". The Seventh Circuit seemingly finds that a loan transaction is a commercial transaction diametrically opposite to an investment transaction. 508 F.2d at 1359. A loan transaction is in a commercial context, in terms of a financial institution's lending function. The financial institution looks to the borrower for repayment, since the loan agreement is a private agreement between lender and borrower. Recoupment of monies is from the borrower independent of any matter pledged. Should the bank sustain a loss, the bottom line analysis is that the financial institution made a poor loan decision, as part of its commercial decision in evaluating the borrower. The relationship between borrower and lender is contractual in terms of a commercial loan of money, not the purchase of a security. Cf. *Lino v. City Investing*, 487 F.2d 689 (3d Cir. 1973); *Bellah v. First National Bank*, 495 F.2d 1109 (5th Cir. 1974).

The stock was not placed nor received by the banks or the business trust with the hope or expectation to profit or otherwise realize gains or dividends therefrom. In the truest sense of the word, as in both *Forman* and *Grenader v. Spitz*, the pledge of the stock was "collateral" to the economic reality of the underlying transaction: a loan with required payments and interest thereon. The transaction was commercial in nature: the reality of the transaction was not in any sense of the word a securities transaction.

The analogy to *Forman*, and the Second Circuit's opinion in *Grenader v. Spitz*, is noteworthy. In those cases, in essence, stock was purchased *in order* that the purchasers could obtain a tenancy in residential buildings. Stock was placed by Mullenax *in order* to obtain the loans.* Once the tenancies and loans were obtained the leases and loan agreements were independent and separate matters. Aside from the consideration of whether the pledge of stock in Select is a "security" or "an offer or sale" under the realm, compass and scope of the act, the transaction simply was not one under the purview of the securities laws.

* The Second Circuit in *Grenader v. Spitz* found that the realities of the purchase of stock were not one where the purchaser was likely to believe they were investing in securities simply because they obtained "shares of stock". The same conclusion is manifest when a bank or other money lending institution receives shares of stock with reference to a loan. A commercial bank's business is lending money, not trading in securities. See *McClure v. First National Bank of Lubbock, supra*, 497 F.2d at 495. The utilization of the federal securities laws is inapposite with Congressional intent, and with state supervision and jurisdiction over banking loan matters. Securities accepted by a money lending institution as collateral for a loan is a matter in reality outside the auspices of the federal legislation intended to protect investors against fraud.

. 2. In *Bland v. United States*, 299 F.2d 105 (5th Cir. 1962), the United States Court of Appeals found reversible error when the trial court failed to reinstruct a jury as to material elements of an offense not embodied in the substantive statute, when the jury requested the judge to have the statute read to them at the course of their deliberations. Petitioner argued to the United States Court of Appeals for the Second Circuit that his case fell within the holding of the Fifth Circuit in *Bland v. United States, supra*.

The pertinent facts are that some one hour after the jury retired to deliberate to reach its verdict in petitioner's case, it requested the substantive statutes with which the defendants had been criminally charged. The jury was faced with a maze of determinations: eleven defendants,* fifty-three counts, several complex statutes, and Mullenax's trial counsel objected to the submission of the statutes without reinstruction by the trial court with regard to the critical and crucial elements of knowledge, willfulness and intent, which elements were not embodied in the statutes. Counsel feared that if the jury relied upon the wording of the statutes alone that Mullenax would be severely prejudiced. The essence of Mullenax's defense was that he was without requisite knowledge and intent. Use of the statutes by the jury without incorporation and consideration of the requisite critical elements of knowledge, willfulness and intent, unequivocally implicated Mullenax in the mainstream of the allegations: securities fraud. Although the jury requested only the statutes, petitioner at such a critical stage of the proceedings was entitled to have the jury reinstructed and reminded of the material elements not embodied in the statutes themselves, and the failure to do so clearly under our mode of jurisprudence denied him a fair trial.

* Three defendants pleaded guilty before trial and testified for the Government. The cases of two defendants were severed.

Since the United States Court of Appeals for the Second Circuit gives such an important matter a different outlook than the United States Court of Appeals for the Fifth Circuit, the question appears ripe for settlement by this Court. It is noted that the *Bland* holding was reaffirmed by the Fifth Circuit in *United States v. Boerner*, 508 F.2d 1064 (1975), and that *Bland's* rationale has been supported by both the District of Columbia and Seventh Circuits. *United States v. Bolden*, 514 F.2d 1301, 1307 (D.C. Cir. 1975); *United States v. Harris*, 388 F.2d 373, 377 (7th Cir. 1967).

3. It was expressly held in *Kastigar v. United States*, 406 U.S. 441, 460-462 (1972), that since a defendant's Fifth Amendment rights were co-extensive only with use and derivative-use immunity, that a defendant would "not [be] dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities", but would be given the opportunity to examine whether immunized testimony was used in *any* respect with regard to the infliction of criminal penalties. This Court clearly stated that the Government would have "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony".

In *United States v. Boyd*, 404 F. Supp. 413 (S.D.N.Y. 1975; Appendix C), the trial court departed from the standard of this Court in *Kastigar* to deny petitioner required hearings and related relief. Although the opinion of the trial court stated that Mullenax's testimony (1) touched on transactions which were before the Grand Jury; (2) mentioned at least one person who was called as a witness at trial, Mullenax was denied his motion for hearings and related relief. It is noted that the trial court's opinion confirmed the fact that the bank and business trust where Mullenax gave Select stock as col-

lateral, all took part in his bankruptcy proceedings and the opinion, moreover, established that 11 U.S.C. § 25 (a)(10) clearly covered "such testimony as was given by defendant Mullenax". Consequently, the denial of *Kastigar* hearings and related relief was in contravention of Mullenax's Fifth Amendment rights.

4. Mullenax after trial by jury was convicted of fifty-one of the fifty-three counts contained in Indictment 75 Cr. 140. On December 2, 1975, he was sentenced to a term of two years with all except six months suspended on each of the fifty-one counts on which he stood convicted, to run concurrently. Additionally, a two-year period of probation and a ten thousand dollar fine with respect to the conspiracy count were imposed.

Even though forty-two substantive counts were reversed, the court of appeals panel did not deem that Mullenax's case ought to have been remanded to the District Court to allow reconsideration of sentence in view of the material change of fact. Such position was manifestly contrary to the holding of other decisions of the same court. See *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States v. DeMarco*, 488 F.2d 828 (2d Cir. 1973); *United States v. Mancuso*, 485 F.2d 275 (2d Cir. 1973); *United States v. Rizzo*, 491 F.2d 1235 (2d Cir. 1974); *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973); *United States v. Hines*, 256 F.2d 561 (2d Cir. 1958); cf. *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975). All these cases hold that remand is appropriate in cases where conviction is reversed on one or more counts, because of the possibility that the conviction on all counts originally before the sentencing court might have effected the punishment for each. The court of appeals panel relied on *United States v. Blitz*, Dkt. No. 75-1237 (2d Cir. March 25, 1976), slip op. 2761, which it is submitted is inconsistent with the underlying reasoning in the

above stated Second Circuit decisions and, more importantly, is totally different from petitioner's case. In *Blitz*, the court did not remand for reconsideration of sentence on the ground that the counts which were reversed with respect to one of the appellants, the sentencing court had imposed suspended sentences, and with regard to the other appellant, the imposition of sentence was suspended by the sentencing court. This is not the case at bar.

A defendant's case ought to be remanded to allow the sentencing court an opportunity to reconsider its original sentence in light of the material change of fact resulting from the reversal of forty-two counts.

5. The memorandum order of the court of appeals' panel summarily stated that petitioner's claim of error have been carefully considered and found to be without merit. It is respectfully submitted that when points of law find support in decision of other circuit courts of appeals, and in decisions of this Court, that it does not suffice to state that after careful and due deliberation such points are without merit. Chief Judge Irving R. Kaufman, writing for the court in *Haymes v. Regan*, 525 F.2d 540, 544 (2d Cir. 1975), stated that a parole board in denying an inmate's parole application should set forth the essential facts and reasons for the denial for the following reasons:

"The compulsion upon the decisionmaker to set forth the reasons in each case of denial of parole, with some specificity, 'promotes thought by the decider' and impels him to 'cover the relevant points'. . . . [The parole board] must provide the inmate with both the grounds for decision to deny him parole, and the essential facts from which the Board's inferences have been drawn."

Petitioner would care to develop the position that in cases such as his where his "claims of error" rest on

reasoning supported by other appellate courts of law, that it does not suffice to summarily affirm his judgment of conviction.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROSENBERG, ROSENBERG, EHRLICH
& SCHUMINSKY,
Attorneys for Petitioner,
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530
Tel. No. 516-248-4300.

JOSEPH B. EHRLICH,
MARC A. ROSENBERG,
Of Counsel.

APPENDIX

APPENDIX A
Memorandum Order of the Court of Appeals
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

**Docket No. 75-1393, 75-1424
75-1426, 75-1432, 76-1048**

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOE TRUMAN BOYD, ERNEST DARWIN GOODLOE, ROBERT
E. FORD, ERNEST R. MULLENAX and M. S. KNISELY,
Appellants.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of April, one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK
Associate Justice, United States Supreme Court,
Retired
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Appendix A—Memorandum Order of the Court of Appeals

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of said District Court be, and they hereby are, *affirmed* as to all appellants on all counts upon which they were convicted, except that, pursuant to the government's concession, the conviction of appellant Mullenax is *reversed* on substantive counts 2-26, 29-37 and 41-48. Under all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed on Mullenax on the counts which are affirmed. See *United States v. Blitz*, slip op. 2761, 2795 n. 46 (2 Cir. March 25, 1976).

We have carefully considered all of appellants' claims of error and we find them to be without merit. Appellants were convicted of serious crimes after a fair trial on the basis of overwhelming evidence. We order that the mandate issue forthwith.

/s/

TOM C. CLARK

.....
TOM C. CLARK
Associate Justice

/s/

WILLIAM H. TIMBERS

.....
WILLIAM H. TIMBERS

/s/

ELLSWORTH A. VAN GRAAFEILAND
.....
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

APPENDIX B**Judgment and Probation/Commitment Order****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT****Docket No. 75 Cr. 140 MP****UNITED STATES OF AMERICA**

—v.—

ERNEST R. MULLENAX,

*Defendant.***JUDGMENT AND PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date, Dec. 2, 1975.

Counsel: With counsel Joseph B. Ehrlich.

Plea: Not guilty.

Findings and Judgment: There being a verdict of not guilty on each of Counts 52 and 53. Guilty on each of Counts 1 to 51 inclusive.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly engaging in conspiracy and in the matters charged in the substantive counts of the indictment in respect to the offer and

Appendix B—Judgment and Probation/Commitment Order

sale of Select Enterprises Inc. stock, by use of means and instruments of transportation & communication in interstate commerce and by use of mails; employing artifices to defraud; obtaining money and property by material untrue statements; and engaging in fraudulent and deceitful practices upon the purchasers and holders of Select securities as collateral. (Title 18, U.S.C., Sections 371, 1341 and 1343, Title 15, Sections 77e, 77q and 77x.)

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of TWO (2) YEARS on each of Counts 1 to 51 inclusive to run concurrently with each other, and on condition that defendant be confined in a JAIL TYPE or TREATMENT TYPE institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on probation for a period TWO (2) YEARS, subject to the standing probation order of this Court. Title 18, Section 3651, U.S. Code.

—AND—

FINED \$10,000. on Count 1. Fine to be paid, or deft. is to stand committed until the fine is paid or he is otherwise discharged according to law. Fine stayed pending appeal. Bail pending appeal fixed at \$10,000, cash or surety. Defendant advised of his right to appeal.

Appendix B—Judgment and Probation/Commitment Order

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of the judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. District Court
Filed Dec. 2, 1975
S.D. of N.Y.

/s/ MILTON POLLACK
MILTON POLLACK
U.S. District Judge
December 2, 1975

APPENDIX C
Opinion of the District Court

UNITED STATES DISTRICT COURT
 S.D. NEW YORK
 No. 75 Cr. 140(MP)
 Nov. 28, 1975

UNITED STATES OF AMERICA
 v.

JOE TRUMAN BOYD et al.,
Defendants.

Defendant, charged with securities fraud conspiracy, moved to inspect grand jury minutes to determine whether evidence submitted to grand jury was tainted in that it was derived from immunized testimony given by defendant in bankruptcy proceedings. The District Court, Pollack, J., held that first meeting of creditors did not fall within exception to ban on use of bankruptcy testimony except such testimony as might be given by the bankrupt in hearing on objections to his discharge, that given aid of government affidavits the task of searching for a possible taint was not so complex nor was the margin for error so great as to render an in camera inspection insufficient and that government's affidavits adequately demonstrated an independent, legitimate source for the challenged evidence.

Motions denied.

Appendix C—Opinion of the District Court

1. CRIMINAL LAW

Defendant's bankruptcy testimony, which was given at first meeting of creditors, which touched on transactions that were before the grand jury and in which defendant had mentioned at least one person who was also called as a witness at trial and at which financial institutions involved in loan transactions forming basis of indictment took part, fell within the statutory ban on use of any bankruptcy testimony or evidence against bankrupt in any criminal proceeding except testimony he may give in hearing on objections to his discharge. Bankr.Act, § 7(a)(10), 11 U.S.C.A. § 25(a)(10).

2. CRIMINAL LAW

Bankrupt's first meeting with creditors was not a "hearing on objections to" his discharge and, hence, bankrupt's testimony did not fall within exception to bar on use of bankruptcy testimony in a criminal proceeding except testimony as might be given by a bankrupt in hearing on objections to his discharge. Bankr.Act, § 7(a)(10), 11 U.S.C.A. § 25(a)(10).

See publication Words and Phrases for other judicial constructions and definitions.

3. INDICTMENT AND INFORMATION

In camera inspection of grand jury minutes established that no reference was made to and no direct or derivative use was made in criminal proceedings of defendant's bankruptcy testimony; since Government's affidavits adequately demonstrated independent, legitimate sources for the documentary evidence submitted to the grand jury and for questioning of the sole witness and no other evidence was presented, there was no need for a hearing to explore possibility of taint and dismissal of the in-

Appendix C—Opinion of the District Court

dictment was not required. Bankr.Act, § 7(a)(10), 11 U.S.C.A. § 25(a)(10).

4. CRIMINAL LAW

Given aid of government affidavits, which were based on actual knowledge rather than information and belief, task of searching for possible taint of grand jury testimony, which allegedly was derived from immunized testimony given by defendant in bankruptcy proceedings, was not so complex as to render *in camera* inspection an insufficient procedure. Bankr.Act, § 7(a)(10), 11 U.S.C.A. § 25(a)(10).

Rosenberg, Rosenberg & Rockman, Garden City, N. Y., for defendant Mullenax, by Joseph B. Ehrlich, Garden City, N. Y.

Thomas J. Cahill, Acting U. S. Atty., S. D., N. Y., by W. Cullen MacDonald, Asst. U. S. Atty., for plaintiff.

OPINION

POLLACK, District Judge.

Ernest Mullenax, one of the defendants in this securities fraud conspiracy case, has renewed his pretrial motions for inspection of the Grand Jury minutes, a hearing to determine whether evidence submitted to the Grand Jury was tainted and dismissal of the indictment against him. Those motions were denied before trial, but leave was granted to renew them post-trial.

On February 10, 1975 an indictment was filed which charged that Mullenax was a member of a conspiracy to

Appendix C—Opinion of the District Court

obtain control of a shell corporation (subsequently named "Select Enterprises, Inc.") without substantial assets, to artificially inflate the price of its share and to sell, distribute and pledge shares of this shell at exorbitant prices.

At trial, the government alleged that Mullenax used Select stock which he knew to be worth less than the represented value as collateral for a \$60,000 loan from the State National Bank of Alabama, for a \$25,000 loan from the Town and Country Business Trust, and as additional collateral for an outstanding loan of \$45,000 with the Home State Bank. A jury convicted the defendant of conspiracy to violate 18 U.S.C. §§ 1001, 1341 and 1343 and 15 U.S.C. §§ 77e, 77q and 77x and of direct violations of all these statutes except 18 U.S.C. § 1001.

[1] On January 5, 1971, pursuant to his voluntary petition in bankruptcy, the defendant testified before the first meeting of creditors. His testimony touched on transactions which were before the Grand Jury that returned the indictment. In his bankruptcy testimony the defendant mentioned at least one person who was also called as a witness at the trial of this action. In addition, the financial institutions involved in the above described loan transactions apparently took part in this bankruptcy proceeding.

Under 11 U.S.C.A. § 25(a)(10)

no [bankruptcy] testimony, or any evidence which is directly or indirectly derived from such testimony, given by him [the bankrupt] shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge.

Appendix C—Opinion of the District Court

This provision, effective on December 15, 1970, clearly covers such testimony as was given by defendant Mullenax. Organized Crime Control Act of 1970, Act of Oct. 15, 1970, P.L. 91-452, Title II, § 260, 84 Stat. 931-932.

The government contends that it did not offer or use at trial the defendant's bankruptcy testimony or any evidence which was directly or indirectly derived therefrom.

Defendant argues that the government must carry a "heavy burden" to demonstrate that it did not make use or derivative use of Mullenax's bankruptcy testimony, *Kastigar v. United States*, 406 U.S. 441, 461-2, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); i.e., that the government must show that it uncovered the involvement of the State National Bank, the Home State Bank and the Town and Country Trust through legitimate, independent sources and that the proof offered to the Grand Jury came from sources other than defendant's bankruptcy testimony.

Affidavits from the Assistant United States Attorney in charge of the Grand Jury and the trial proceedings in this case assert that, while the government had possession of defendant's bankruptcy testimony, no government attorney read or made use of that testimony.

The government affidavits also declare that the involvement of the State National and Home State Banks was discovered through a 1970 SEC investigator's affidavit and that the involvement of the Town and Country Trust was revealed in a 1972 letter to the SEC from an attorney for the Trust. In addition, the government points to the record in the related civil case, *SEC v. Select*, 70 Civ. 3795, as the source for the questions asked of

Appendix C—Opinion of the District Court

William Chapel, the only witness to testify against Mullenax before the Grand Jury. That record includes the 1970 affidavit.

Finally, the government affiant asserts, on information and belief, that the bankrupt's testimony, was not compelled over any assertion of the defendant's Fifth Amendment privilege and that such testimony was "given by him in the hearing upon objections to his discharge" so as to eliminate any possibility under 11 U.S.C.A. § 25(a)(10) that Mullenax's bankruptcy testimony was immunized.

[2] The government's argument that the first meeting of creditors was a "hearing on objections to" Mullenax's discharge is unavailing. Such a hearing was apparently held in August of 1972, cf. *In the Matter of Ernest Richard Mullenax*, Bankruptcy No. 19,798-B-2 (D.Kan., filed July 5, 1973), but the testimony given by the bankrupt in that hearing is not the subject of this motion. By providing in section 14(b)(1) of the Bankruptcy Act, 11 U.S.C.A. § 32(b)(1) (1974 Supp.), that the Court should fix a time for the filing of objections to the bankrupt's discharge between 30 and 90 days "after the first date set for the first meeting of creditors," the Congress clearly intended that hearings on objections to the discharge would be held well after the first meeting of creditors. See 1A *Collier on Bankruptcy*. ¶ 14.06 at 1273-4 (14 ed. 1975).

The transcript of Mullenax's testimony at the first meeting of creditors, which defendant submitted to this Court and which is the subject of this motion, contains no evidence that defendant actually asserted his Fifth Amendment rights or affirmatively invoked the protection of the bankruptcy immunity statute. See *United States*

Appendix C—Opinion of the District Court

v. *Dornau*, 491 F.2d 473, 480 n.13 (2d Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974); *United States v. Goodwin*, 470 F.2d 893, 903-4 (5th Cir. 1972), cert. denied, 411 U.S. 969, 93 S.Ct. 2160, 36 L.Ed.2d 691 (1973). But the issue of whether or not Mullenax nevertheless received immunity is one that the Court need not reach in light of its finding that there was no possibility of a taint from the evidence before the Grand Jury.

[3, 4] The testimony relating to this defendant before the Grand Jury was furnished to the defendant in connection with the pretrial and trial proceedings herein. An *in camera* inspection of all the Grand Jury minutes conducted by this Court reveals unequivocally that no reference was made to and no direct or derivative use made of Mullenax's bankruptcy testimony. The government's affidavits having adequately demonstrated independent, legitimate sources for the documentary evidence submitted to the Grand Jury and for the questioning of Chapel before the Grand Jury, and this evidence being the sum total presented to the Grand Jury, there is no need for a *Kastigar* hearing to explore the possibility of taint and dismissal of the indictment is not required. In addition, Chapel's testimony supplies legitimate and independent evidence sufficient to support the indictment. See *United States v. James*, 493 F.2d 323, 326 (2d Cir.), cert. denied, 419 U.S. 49, 95 S.Ct. 87, 42 L.Ed.2d 79 (1974).

Unlike the situation faced by Judge Metzner in *United States v. Dornau*, 356 F.Supp. 1091 (S.D.N.Y. 1973),¹

¹ In *Dornau*, Judge Metzner ordered that defendant was to be allowed to inspect the Grand Jury minutes on the grounds that the Court had "neither the time nor the competence" to conduct an

[Footnote continued on following page]

Appendix C—Opinion of the District Court

defendant Mullenax has been given access to all of the evidence against him which was submitted to the Grand Jury. He has received the relevant portion of Chapel's testimony and had access to all relevant documents examined by the Grand Jury, which documents were also admitted as trial exhibits. Defendant has not pointed to and this Court cannot find any part of this evidence which might not have been derived from the independent and legitimate sources described in the government affidavits.

Accordingly, the defendant's renewed motions are all denied.

So ordered.

effective *in camera* inspection of the minutes. *Dornau, supra*, at 1100. Judge Metzner later granted defendant's request for a *Kastigar* hearing and subsequently dismissed the indictment. 359 F. Supp. 684 (S.D.N.Y. 1973). That dismissal was later reversed on the ground that Dornau had received only use immunity under the old version of § 25(a)(10) (which is not applicable here) and the government had not violated such use immunity. *United States v. Dornau*, 491 F.2d 473, 480 (2d Cir.), cert. denied, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974).

In this case, given the aid of the government affidavits, the task of searching for a possible taint is not so complex nor is the margin for error so great as to render *in camera* inspection an insufficient procedure. See *Alderman v. United States*, 394 U.S. 165, 182, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), quoted in, *United States v. Dornau*, 356 F. Supp. 1091, 1100 (S.D.N.Y. 1973). The government's allegations regarding the lack of any taint were based on actual knowledge rather than "information and belief." The government affiant had handled the Grand Jury proceedings, whereas in *Dornau* the affiant had not.

APPENDIX D
Order of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
 SECOND CIRCUIT

—◆—
Docket No. 75-1393

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
 —v.—

JOE TRUMAN BOYD, JAMES CALVIN JOINER, ERNEST DARWIN GOODLOE, ROBERT E. FORD, SELWYN WEBER, EMERSON F. TITLOW, ERNEST R. MULLENAX, M. S. KNISELY, HOWARD L. BROOKSHIRE, WILLIAM WAYNE BARNETT, MARVIN J. RAPPAPORT, STANLEY SCHLEGER, EDWARD VANASCO, ALAN SEGEL, ROGER BISSET and JOHN WELLS,

Defendants,

M. S. KNISELY, ERNEST R. MULLENAX, JOE TRUMAN BOYD, ROBERT E. FORD, ERNEST D. GOODLOE,
Defendants-Appellants.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hundred and seventy-six.

Present: HON. TOM C. CLARK

Associate Justice

HON. WILLIAM H. TIMBERS,

HON. ELLSWORTH A. VAN GRAAFELAND,

Circuit Judges.

A petition for a rehearing having been filed herein by counsel for the appellant, Ernest R. Mullenax, upon consideration thereof, it is ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

**Order of Court of Appeals Denying Rehearing
 in Banc**

UNITED STATES COURT OF APPEALS
 SECOND CIRCUIT

—◆—
Docket No. 75-1393

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
 —v.—

JOE TRUMAN BOYD, JAMES CALVIN JOINER, ERNEST DARWIN GOODLOE, ROBERT E. FORD, SELWYN WEBER, EMERSON F. TITLOW, ERNEST R. MULLENAX, M. S. KNISELY, HOWARD L. BROOKSHIRE, WILLIAM WAYNE BARNETT, MARVIN J. RAPPAPORT, STANLEY SCHLEGER, EDWARD VANASCO, ALAN SEGAL, ROGER BISSETT and JOHN WELLS,

Defendants,

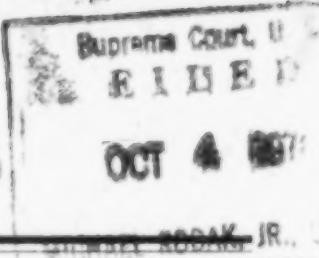
M. S. KNISELY, ERNEST R. MULLENAX, JOE TRUMAN BOYD, ROBERT E. FORD, ERNEST D. GOODLOE,
Defendants-Appellants.

—◆—
 A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Ernest R. Mullenax, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN,
 IRVING R. KAUFMAN,
 Chief Judge

Nos. 75-1905 AND 75-1910



In the Supreme Court of the United States
OCTOBER TERM, 1976

ERNEST R. MULLENAX, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT E. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ROGER A. PAULEY,
ROBERT H. PLAXICO,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	6
Conclusion	13

CITATIONS

Cases:

<i>American Bank & Trust Co. v. Joste</i> , 323 F. Supp. 843	7
<i>Barnes v. United States</i> , 412 U.S. 837	6
<i>Bellah v. First National Bank</i> , 495 F. 2d 1109	7
<i>Bland v. United States</i> , 299 F. 2d 105	10
<i>Blumenthal v. United States</i> , 332 U.S. 539	12
<i>C. N. S. Enterprises, Inc. v. G. & G. Enterprises, Inc.</i> , 508 F. 2d 1354	7
<i>Grenader v. Spitz</i> , 537 F. 2d 612	7
<i>Hyde v. United States</i> , 225 U.S. 347	13
<i>Kastigar v. United States</i> , 406 U.S. 441	8, 9
<i>Koolish v. United States</i> , 340 F. 2d 513, certiorari denied, 381 U.S. 951	11
<i>Lego v. Twomey</i> , 404 U.S. 477	9
<i>Lino v. City Investing Co.</i> , 487 F. 2d 689	7

	Page
Cases—Continued:	
<i>Llanos v. United States</i> , 206 F. 2d 852, certiorari denied, 346 U.S. 923	7
<i>McClure v. First National Bank of Lubbock, Texas</i> , 497 F. 2d 490, certiorari denied, 420 U.S. 930	8
<i>Securities and Exchange Commission v. Dolnick</i> , 501 F. 2d 1279	7
<i>Securities and Exchange Commission v. Guild Films Co.</i> , 279 F. 2d 485, certiorari denied <i>sub nom. Santa Monica Bank v. Securities and Exchange Commission</i> , 364 U.S. 819	7
<i>Securities and Exchange Commission v. National Bankers Life Ins. Co.</i> , 334 F. Supp. 444, affirmed, 477 F. 2d 920	7
<i>United Housing Foundation, Inc. v. Forman</i> , 421 U.S. 837	7
<i>United States v. Boerner</i> , 508 F. 2d 1064, certiorari denied, 421 U.S. 1013	10
<i>United States v. Bolden</i> , 514 F. 2d 1301	10
<i>United States v. Cirillo</i> , 499 F. 2d 872, certiorari denied, 419 U.S. 1056	12
<i>United States v. DeMarco</i> , 488 F. 2d 828	11
<i>United States v. Gentile</i> , 530 F. 2d 461, certiorari denied, No. 75-6346, June 14, 1976	6, 7, 8
<i>United States v. Harris</i> , 388 F. 2d 373	10

	Page
Cases—Continued:	
<i>United States v. Matlock</i> , 415 U.S. 164	9
<i>United States v. Perez</i> , 489 F. 2d 51, certiorari denied, 417 U.S. 945	12
<i>United States v. Savard</i> , 493 F. 2d 490, certiorari denied, 419 U.S. 896	10
<i>United States v. Tramunti</i> , 513 F. 2d 1087, certiorari denied, 423 U.S. 832	13
Statutes:	
<i>Securities Act</i> c. 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a <i>et seq.</i> :	
Section 2(3), 15 U.S.C. 77b(3)	6
Section 5, 15 U.S.C. 77e	3, 9
Section 17, 15 U.S.C. 77q	3, 9
Section 17(a), 15 U.S.C. 77q(a)	2, 6, 7, 8
Section 24, 15 U.S.C. 77x	3
<i>Securities Exchange Act of 1934</i> , 48 Stat. 891, as amended, 15 U.S.C. 78a <i>et seq.</i>	7
Section 3(a)(14), 15 U.S.C. 78c(a)(14)	8
8 U.S.C. 1324(1)	10
11 U.S.C. 25 (a)(10)	8
18 U.S.C. 371	3, 6
18 U.S.C. 1001	3, 9, 10
18 U.S.C. 1341	3, 6, 9, 10
18 U.S.C. 1343	3, 6, 9, 10

Page

Miscellaneous:

H. R. Rep. No. 85, 73d Cong., 1st Sess. (1933)	8
Rule 35, Fed. R. Crim. P.	11

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1905

ERNEST R. MULLENAX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-1910

ROBERT E. FORD, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of affirmance of the court of appeals is unreported (M. Pet. App. A).¹ The opinion of the district court (M. Pet. App. C) is reported at 404 F. Supp. 413.

¹"M. Pet." refers to the petition in No. 75-1905 and "F. Pet." refers to the petition in No. 75-1910.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976, and petitions for rehearing with suggestion for rehearing *en banc* were denied on June 2, 1976 (M. Pet. App. D; F. Pet. App. B, C). The petition for a writ of certiorari in No. 75-1905 was filed on July 1, 1976, and the petition in No. 75-1910 was filed on July 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fraudulent pledge of securities as collateral for a loan constitutes a "sale" under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a).
2. Whether the district court erred in resolving, without an evidentiary hearing, a claim that testimony given under a statutory grant of immunity had been improperly used by the government in a subsequent prosecution.
3. Whether the district court abused its discretion by granting a jury request for copies of the criminal statutes alleged in the indictment to have been violated, without reinstructing the jury on the elements of those crimes.
4. Whether the court of appeals erred in refusing to remand to the district court for reconsideration of sentencing after reversing several counts against petitioner Mullenax.
5. Whether the evidence proved the single conspiracy charged in the indictment and whether the district court correctly instructed the jury concerning that conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to commit securities fraud,

in violation of 18 U.S.C. 371, 27 counts of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343, and 23 counts of securities fraud and the sale of unregistered securities, in violation of 15 U.S.C. 77q, 77e and 77x (M. Pet. 4). Petitioner Ford also was convicted on two counts of making false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 1001 (F. Pet. 5).² Petitioner Mullenax was sentenced to two years' imprisonment, all but six months of which were suspended in favor of two years' probation, and was fined \$10,000. Petitioner Ford was sentenced to five years' imprisonment and a \$10,000 fine. The court of appeals affirmed the conviction of petitioner Ford on all counts and affirmed the conviction of petitioner Mullenax on the conspiracy count and eight substantive counts. Pursuant to the government's concession, however, the court reversed petitioner Mullenax's conviction on 42 substantive counts that related to events occurring prior to his entry into the conspiracy (M. Pet. 4, n. * * *).

The evidence showed that petitioners were involved in a complex scheme to inflate artificially the price of a shell corporation, Select Enterprises, Inc. ("Select"), whose actual assets were close to worthless.³ The object of this scheme was to defraud the public by using the inflated stock to purchase assets and secure loans.

²Co-defendants Joe Boyd, Ernest Goodloe, and M. S. Knisely were also convicted of conspiracy and numerous substantive counts of securities fraud. Three other defendants, James Joiner, Alan Segal, and John Wells, pleaded guilty before trial and testified for the prosecution. Seven additional defendants were acquitted at trial.

³A complete statement of the evidence at trial is contained in pp. 4-43 of the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

The plan commenced in January 1970, when co-defendants Boyd and Joiner acquired all of the stock in a dormant Nevada corporation, Goldfield Candelaria Cooperative Mining Company, Inc., which was renamed "Select." At approximately the same time, co-defendant Goodloe and petitioner Ford sought to acquire assets for Select, which were subsequently listed at fraudulently inflated prices on Select's balance sheets. Co-defendant Knisely was designated as president of Select (Tr. 976, 1394), while co-conspirator Segal engaged in efforts to open an over-the-counter market for Select stock (Tr. 966-968, 977-978).

Select's first balance sheet, issued on January 27, 1970, purported to show that it owned three valuable properties: (1) New Mexico mica mines purchased from C.A. Morris & Company, Inc.; (2) real estate in Midland, Texas, purchased from the South Midland Development Corporation; and (3) Texas oil and gas leases.⁴ Petitioner Ford prepared conveyances for the mica mines and oil and gas leases, as well as title opinions on those properties.⁵ Although these documents were dated January 23 and 26, 1970, they actually had been signed much later and were backdated by the conspirators after personnel of the Securities and Exchange Commission began to investigate the company.

⁴The mines were listed as having a value of some \$19 million, although they had been almost completely inactive for at least ten years (Tr. 1407, 1434-1447). The real estate was valued on the balance sheet at some \$1 million, but in fact it was not worth the \$60,000 in taxes then assessed against it (Tr. 948-957). The gas leases were valued at \$5 million, but were actually worth no more than \$225,000 (Tr. 1518, 1598-1599).

⁵As petitioner Ford was aware, the conveyance of the oil leases was ineffective because their owner had previously agreed to convey a 50 percent interest in them to another party. Nonetheless, the title opinion letter failed to mention this other interest (Tr. 1519-1553).

Using this false balance sheet, Segal was able to initiate a market in Select stock. After trading in the stock began on February 9, 1970, Segal managed to force the price as high as \$18 per share before the S.E.C., which had been given copies of Select's balance sheet and other documents by brokers dealing with Segal, began its investigation (Tr. 109-110, 131-132, 145-146, 158, 163-165, 383-384, 447-448).

On March 9, 1970, Boyd appeared before the S.E.C. in Fort Worth, Texas, and made a variety of false statements under oath concerning the financial strength of Select and his financial dealings with Segal. A few weeks later, petitioner Ford met with Boyd, Knisely, Goodloe, and others at his law office in order to compose a new, purportedly "certified" financial statement for Select. This new balance sheet, which included the same overvalued properties as the earlier statement (Tr. 1011-1012, 1376-1380), was submitted to the S.E.C. on April 6, 1970, by Boyd and petitioner Ford. Subsequently, Boyd, in petitioner Ford's presence, gave other false testimony to the S.E.C. (Tr. 742-745, 1222-1229), and petitioner Ford, while not under oath, made false statements to S.E.C. officials concerning Select's title to certain land in California.⁶

⁶During the period of the S.E.C. investigation, members of the Select group, including petitioner Ford, also tried to acquire other purportedly valuable assets for Select to list on its balance sheet. On February 17, 1970, petitioner Ford met with Hoyt W. L. Brinlee and Joan Vinson, who signed an agreement to sell Select certain tracts of land in Imperial County, California, in return for Select stock. The agreement stated that Brinlee and Vinson were owners of the property although, as petitioner Ford knew, they only held quitclaim deeds to the land. When the "sale" was consummated, petitioner Ford had the two sign warranty deeds rather than the more appropriate quitclaim deeds (Tr. 1194-1197, 1205-1214). The property was listed in Select's balance sheet at a value of \$25 million, although it was almost worthless desert land, some of which was not even located in the United States and other parts of which were owned by the government (Tr. 1334, 1512-1516).

The S.E.C. temporarily suspended trading in Select stock between April 2 and 11, 1970, but a short-lived market was reestablished by the end of April. In early May 1970, using the fraudulent balance sheets and a deceptive press release, petitioner Mullenax was able to pledge several thousands shares of Select stock, given to him by Boyd, as collateral for loans totalling \$90,000: 20,000 shares to secure \$65,000 in loans from the State National Bank of Alabama, 10,000 shares to provide additional collateral on an already outstanding loan from the Home State Bank of MacPherson, Kansas, and 2,000 shares to obtain a \$25,000 loan from the Town and Country Business Trust of Wichita, Kansas (Tr. 1647-1676, 1287-1296, 1605-1611). Petitioner Mullenax retained a portion of these loans and disbursed the rest to other members of the conspiracy (Tr. 1029).

ARGUMENT

I. Petitioner Mullenax's principal contention (M. Pet. 6-8) is that the fraudulent pledge of securities as collateral for a loan does not constitute a "sale" within the meaning of Section 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a).⁷ The Court has recently denied review of this issue in *United States v. Gentile*, 530 F. 2d 461, 466-467 (C.A. 2), certiorari denied, No. 75-6346, June 14, 1976. As we noted

"Sale" is defined by Section 2(3) of the Act, 15 U.S.C. 77b(3), to include "every *** disposition of a security or interest in a security, for value."

Petitioner's sentence of imprisonment on the counts charging violations of the Securities Act is concurrent with that on his convictions for mail and wire fraud (18 U.S.C. 1341 and 1343) and for conspiracy (18 U.S.C. 371). Thus, a ruling favorable to petitioner on this issue would not affect his sentence. See *Barnes v. United States*, 412 U.S. 837, 848, n. 16.

in our Brief in Opposition in that case, petitioner's claims are inconsistent with the language and intent of the Securities Act and, accordingly, have been rejected by every court to have considered this question.⁸

United Housing Foundation, Inc. v. Forman, 421 U.S. 837, is not to the contrary. *Forman* involved the issue of whether tenants' shares of so-called "stock" in a co-operative housing project constituted securities under either the Securities Act of 1933 or the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a *et seq.* Here, there is no doubt that the Select shares pledged for loans by Mullenax were "securities," as defined in the federal securities laws; the issue, rather, is whether a pledge of those securities as collateral for a loan constitutes a "sale" under Section 17(a) of the Securities Act.⁹ Since a pledge is undoubtedly the disposition of an "interest in a security, for value,"

⁷See, e.g., *Securities and Exchange Commission v. Dolnick*, 501 F. 2d 1279, 1282 (C.A. 7); *Securities and Exchange Commission v. Guild Films Co.*, 279 F. 2d 485, 489 (C.A. 2), certiorari denied *sub nom. Santa Monica Bank v. Securities and Exchange Commission*, 364 U.S. 819; *Securities and Exchange Commission v. National Bankers Life Ins. Co.*, 334 F. Supp. 444, 456 (N.D. Tex.), affirmed, 477 F. 2d 920 (C.A. 5); *American Bank & Trust Co. v. Joste*, 323 F. Supp. 843, 845-846 (W.D. La.). Cf. *Llanos v. United States*, 206 F. 2d 852, 854 (C.A. 9), certiorari denied, 346 U.S. 923. We are furnishing petitioner Mullenax with a copy of our brief in *Gentile*.

⁸Petitioner again fails to distinguish between the issues of what is a security and what is a sale of a security in citing *C.N.S. Enterprises, Inc. v. G. & G. Enterprises, Inc.*, 508 F. 2d 1354 (C.A. 7); *Lino v. City Investing Co.*, 487 F. 2d 689 (C.A. 3); and *Bellah v. First National Bank*, 495 F. 2d 1109 (C.A. 5). These decisions all discuss whether promissory notes given in exchange for loans constitute securities. Similarly, *Grenader v. Spitz*, 537 F. 2d 612 (C.A. 2), applied *Forman* to another tenants' suit and does not even mention, much less purport to restrict, the court's prior holding in *Gentile*.

and since the legislative history of the Securities Act indicates that Congress intended the term "sale" to be broadly construed to effectuate the statute's remedial purposes (see H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933)), the court of appeals correctly concluded that petitioner's fraudulent transactions constituted a "sale" within Section 17(a) of the Act, 15 U.S.C. 77q(a).¹⁰

2. Petitioner Mullenax contends (M. Pet. 10-11) that the district court erred in not holding an evidentiary hearing to determine whether information derived from his testimony at a bankruptcy proceeding in 1971 had been utilized in the government's prosecution. Under 11 U.S.C. 25(a)(10), evidence derived from the testimony of a bankrupt at a bankruptcy proceeding may not be used against him in a subsequent criminal action. Petitioner's reliance upon *Kastigar v. United States*, 406 U.S. 441, 460, is misplaced, however, for that decision holds only that the government has an "affirmative duty" to prove that its evidence was not obtained, directly or indirectly, from a defendant's immunized testimony. It does not specify the procedures by which

¹⁰There is no conflict between the position of the Second Circuit in this case and that of the Fifth Circuit in *McClure v. First National Bank of Lubbock, Texas*, 497 F. 2d 490, 495 (C.A. 5), certiorari denied, 420 U.S. 930. As we pointed out in our Brief in Opposition in *Gentile*, the Fifth Circuit in *McClure* held only that a pledge of stock was not a "sale" under the Securities Exchange Act, which defines the term more narrowly than does the Securities Act. While Section 3(a)(14) of the 1934 Act, 15 U.S.C. 78c(a)(14), defines "sale" as "any contract to sell or otherwise dispose of" a security, the 1933 Act defines "sale" to include the disposition of an "interest in a security." A pledgee obviously takes a legally enforceable interest in pledged securities. We note in addition that the court in *McClure* acknowledged that a pledge of securities "can constitute a 'sale' in some cases" (497 F. 2d at 495).

this affirmative duty may be satisfied. Here, the trial court determined that the affidavits submitted by the government, together with the transcripts of the grand jury testimony relating to petitioner Mullenax, were sufficient to resolve the issue, and petitioner has offered no reasons why this factual determination was incorrect or why an evidentiary hearing would have aided resolution of the question.¹¹

3. One hour after the jury began its deliberations, it requested a copy of the statutes referred to in the conspiracy count of the indictment.¹² Petitioner Mullenax contends (M. Pet. 9-10) that the district court erred in acceding to this request without contemporaneously repealing its original instructions on knowledge, willfulness and intent. But the appropriate response to a jury request rests within the sound discretion of the trial court, and it is clear that petitioner was not prejudiced by the method chosen here.

The jury's request in this case came at the outset of its deliberations, during its consideration of the conspiracy count and only a short time after it had heard the court's detailed instructions on all the elements of the crimes charged. Moreover, a full charge on some of the substantive counts was reread to the jurors a day later, before they returned a verdict on any count.

¹¹The district court's opinion (M. Pet. App. C), upon which we rely, amply demonstrates the correctness of its conclusion that the government's case against petitioner was "derived from a legitimate source wholly independent of [petitioner's bankruptcy] testimony." *Kastigar v. United States*, *supra*, 406 U.S. at 460. The government's burden of proof under *Kastigar*, of course, is the preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177, n. 14; *Lego v. Twomey*, 404 U.S. 477, 489.

¹²I.e., 18 U.S.C. 1001, 1341 and 1343; 15 U.S.C. 77e and 77q.

Indeed, the jury's acquittal of petitioner on two counts and its acquittal of seven other defendants on all charges suggests a more discriminating analysis than that attributed to it by petitioner. Finally, several of the crimes with which petitioner was charged manifest on their face a requirement of knowing and intentional activity.¹³ By contrast, *Bland v. United States*, 299 F. 2d 105 (C.A. 5), on which petitioner primarily relies (M. Pet. 9), involved a statute (8 U.S.C. 1324(1)) that omitted any reference to willfulness or knowledge, and the jury request in that case occurred at a time when the trial court's original instructions could not have been "fresh in the minds of twelve lay jurors." 299 F. 2d at 109. See *United States v. Savard*, 493 F. 2d 490, 492 (C.A. 5), certiorari denied, 419 U.S. 896.¹⁴

4. Petitioner Mullenax claims (M. Pet. 11-12) that the court of appeals' reversal of 42 of the counts on which he was convicted required a remand to the district court for resentencing on the remaining nine counts. As petitioner correctly notes, the Second Circuit has often re-

¹³Section 1001 prohibits "knowingly and willfully" falsifying documents and Sections 1341 and 1343 prohibit "devis[ing] or intending to devise any scheme or artifice to defraud" in connection with the use of mail or wire facilities.

¹⁴The other cases cited by petitioner (M. Pet. 10) are also distinguishable. In *United States v. Bolden*, 514 F. 2d 1301 (C.A. D.C.), the court reversed the conviction because, in response to a specific question relating to the felony murder rule, the trial judge had only repeated the statute and standard instruction without addressing the specifics of the jury's inquiry. *United States v. Harris*, 388 F. 2d 373 (C.A. 7), involved a situation in which both the trial court's instructions and reinstructions to the jury had omitted a definition of a necessary element of the crime. *United States v. Boerner*, 508 F. 2d 1064 (C.A. 5), certiorari denied, 421 U.S. 1013, noted the Fifth Circuit's prior decision in *Bland*, but distinguished it from the facts of that case.

manded for sentencing reconsideration when some counts of a conviction have been reversed on appeal. The court's use of this remedy has not been indiscriminate, however, and has been applied only when it was thought likely that a count ultimately reversed "might have affected" the sentence on counts ultimately affirmed. See *United States v. DeMarco*, 488 F. 2d 828, 833 (C.A. 2). Here, since the counts that were reversed related to the same continuing course of conduct as the nine remaining counts, it seems wholly unlikely that the reversals would have caused the district court to impose a lesser sentence on remand than the short concurrent sentences originally imposed.¹⁵ In any event, even assuming that the court of appeals incorrectly determined (M. Pet. App. 2a) that "[u]nder all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed," petitioner has a full and adequate remedy in a motion to reduce his sentence under Rule 35, Fed. R. Crim. P.

5. Petitioner Ford's sole contentions (F. Pet. 8-14) are that the evidence at trial showed multiple conspiracies instead of the single conspiracy alleged in the indictment and that the trial court erred in its charge to the jury on this issue. The test for determining whether the evidence established a single conspiracy is "whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is a concerted action to achieve this end." *Koolish v. United States*, 340 F. 2d 513, 524 (C.A. 8), certiorari denied, 381 U.S. 951.

¹⁵Petitioner's initial sentence of two years' imprisonment, most of which was suspended, was substantially lighter than that of his co-defendants, thus evidencing the trial court's awareness of his lesser role in the conspiracy.

Although petitioner Ford argues that he only participated in a portion of the overt acts proven at trial, the essence of a conspiracy is a cooperative effort by several persons to accomplish an unlawful result. As the Court noted in *Blumenthal v. United States*, 332 U.S. 539, 559, the crucial question is whether the alleged conspirators had "knowledge of the plan's general scope, if not its exact limits, [and] sought a common end." See also *United States v. Cirillo*, 499 F. 2d 872, 887 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States v. Perez*, 489 F. 2d 51, 61-62 (C.A. 5), certiorari denied, 417 U.S. 945.

The evidence in this case clearly established that the conspirators' various acts were directed toward the common goal of inflating the worthless Select stock in order to defraud persons selling assets or loaning money. While petitioner claims that he engaged in certain activities without knowledge of the conspiratorial scheme, his participation in backdating key documents, preparing the fraudulent March 26 balance sheet, and lying to the S.E.C. certainly supported the contrary conclusion drawn by the jury.

Furthermore, the trial court correctly instructed the jury that it was required to acquit unless petitioner Ford was shown to have been a member of the conspiracy alleged in the indictment. Petitioner was not entitled to a charge requiring an acquittal merely if more than one conspiracy was proven, because that instruction "fails to take into account the very real possibility that one of the proven conspiracies was the single conspiracy charged." *United States v. Tramunti*, 513 F. 2d 1087, 1107 (C.A. 2), certiorari denied, 423 U.S. 832.¹⁶

¹⁶Venue in the prosecution of a criminal conspiracy lies in any district in which an overt act occurred. *Hyde v. United States*, 225 U.S. 347, 367. Thus, venue was properly laid in the

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ROGER A. PAULEY,
ROBERT H. PLAXICO,
Attorneys.

OCTOBER 1976.

Southern District of New York, since many of Segal's manipulative efforts occurred there. Contrary to petitioner Ford's contention (F. Pet. 12), the trial court's charge to the jury on this issue was proper. As noted above, the judge instructed that petitioner must be found to have been a member of the conspiracy charged (Tr. 2532) and further instructed that at least one overt act in furtherance of the conspiracy must have been committed by a conspirator in the Southern District of New York (Tr. 2522).

75-1905

No. ~~75-1905~~

Supreme Court, U. S.
FILED

OCT 14 1976

R. CLERK

IN THE

Supreme Court of the United States

October Term, 1976

ERNEST R. MULLENAX, PETITIONER,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY MEMORANDUM FOR PETITIONER
ERNEST R. MULLENAX**

JOSEPH B. EHRLICH,
MARC A. ROSENBERG,
Attorneys for Petitioner,
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530.
Tel. No. 516-248-4300.

TABLE OF CONTENTS

	PAGE
Reply Memorandum for Petitioner	1
Conclusion	7

TABLE OF CASES

<i>C. N. S. Enterprises, Inc. v. G & G Enterprises, Inc.,</i> 508 F.2d 1354 (7th Cir. 1975)	3
<i>Grenader v. Spitz</i> , 537 F.2d 612 (2d Cir. 1976)	2
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972) .. 3, 4, 5	
<i>McClure v. First National Bank of Lubbock, Texas,</i> 497 F.2d 490 (5th Cir. 1974), cert. denied, 420 U.S. 930 (1975)	1, 2
<i>United Housing Foundation, Inc. v. Forman</i> , 95 S. Ct. 2051 (1975)	2
<i>United States v. Boyd</i> , 404 F. Supp. 413 (S.D.N.Y. 1975)	4
<i>United States v. Gentile</i> , 530 F.2d 461 (2d Cir.), cert. denied, No. 75-6346, June 14, 1976	1

STATUTES

United States Code:	
18 U.S.C. § 1001	6
18 U.S.C. § 1341	6
18 U.S.C. § 1343	6

IN THE
Supreme Court of the United States
October Term, 1976

No. 75-1905

ERNEST R. MULLENAX,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER
ERNEST R. MULLENAX

1. The Brief in Opposition to the petition for a writ of certiorari argues that there is no conflict between the Second Circuit and Fifth Circuit in the respective decisions in *United States v. Gentile*, 530 F.2d 461, *cert. denied*, No. 75-6346, June 14, 1976, and *McClure v. First National Bank of Lubbock, Texas*, 497 F.2d 490, *cert. denied*, 420 U.S. 930 (1975) regarding the issue of whether a pledge of stock as collateral for a loan, brings the transaction within the purview of the federal securities laws. Respondent sets forth that the Fifth Circuit's decision in *McClure* concerned the issue raised in terms of the Securities Exchange Act of 1934, while the issue was

raised under the Securities Act of 1933 in *Gentile*. Respondent correctly notes that definition of the term "sale" under the two acts somewhat differs, but the Fifth Circuit's decision in *McClure* was not directly attendant to the definition of the term "sale" in the Securities Exchange Act of 1934, but hinged on the essential economic realities of the transaction before the court, *McClure v. First National Bank of Lubbock, Texas, supra*, 497 F.2d at 495, and was similar to this Court's line of reasoning in *United Housing Foundation, Inc. v. Forman*, 95 S. Ct. 2051, which spoke in terms of both the Securities Act of 1933 and the Securities Exchange Act of 1934. This Court in *Forman* clearly looked upon the economic realities of the transaction involved, and found that regardless of the fact that "stock" may have been involved, that the transaction was not a securities transaction, nor one which embraced the federal securities remedial legislation. *United Housing Foundation, Inc. v. Forman, supra*, 95 S. Ct. at 2058-2059, 2063.

The Fifth Circuit in *McClure* stated that the pledge of stock as collateral in a loan transaction would not embrace "the federal securities acts", and resultantly is in conflict with the Second Circuit's decision in *Gentile*. *McClure v. First National Bank of Lubbock, Texas, supra*, 497 F.2d at 495. Additionally, respondent notes that the Second Circuit's later decision in *Grenader v. Spitz*, 537 F.2d 612 (1976) did not mention or restrict its decision in *Gentile*. The point sought to be asserted in petitioner's brief to the Court was that the Second Circuit in *Gentile* in reversing the lower court decision specifically stated that the "literal" approach of bringing transactions within the two securities acts was "explicitly rejected" by this Court in *Forman*, and that this Court "stressed 'economic reality'" of the transactions in issue. *Grenader v. Spitz, supra*, 537 F.2d at 616, 617. Resultantly, conflict remains with the *Gentile* case, and other

authorities cited in the Brief in Opposition, and this Court is respectfully asked to clarify and consider the question whether the pledge of stock as collateral in a loan related transaction embraces the federal remedial legislation.

a. Respondent correctly notes that *C. N. S. Enterprises, Inc. v. G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir. 1975), involved a question of whether promissory notes given to a bank in a loan related transaction constituted securities under the federal securities laws, and to this particular extent is distinguishable from the case at bar. However, in finding the promissory notes did not constitute securities in such regard, the Seventh Circuit employed the type of reasoning contained in the Court's *Forman* decision and referred to the "commercial-investment dichotomy" test as a standard for ascertaining whether the economic realities of the transaction involved embraced the federal securities laws. *C. N. S. Enterprises, Inc. v. G & G Enterprises, Inc., supra*, 508 F.2d at 1359-1361. In this regard, the Seventh Circuit, in apparent accord with the *Forman* standard, stated that a loan transaction was a commercial transaction angularly opposite to an investment transaction, the latter which are transactions intended to be embraced by the federal securities legislation. 508 F.2d at 1359. Consequently, the Seventh Circuit clearly implied in its dictum that a pledge of a security in connection with a loan related transaction is removed from the breadth of the federal securities law legislation.

2. The Brief in Opposition asserts that the Court in *Kastigar v. United States*, 406 U.S. 441 (1972), did not specifically mandate that a hearing be conducted by the trial court with reference to the prosecution's affirmative duty to establish that the immunized testimony

of a criminal defendant was not used in any respect in his criminal prosecution. Such posture would effectively abridge the Court's concern in *Kastigar* that a criminal defendant would "not . . . [be] . . . dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar v. United States, supra*, 406 U.S. at 460. Rudimentary principles and precepts in our mode of jurisprudence strongly suggest that the Court did not intend to obviate a defendant's right to examine and confront the critical issue raised in terms of his immunized testimony. To support the contention that affidavits submitted by the prosecution evidence its "affirmative duty" under *Kastigar*, without at a minimum an allowance by the defendant to examine and question the affiants, is not at all consonant with the concern of the Court that the defendant need not be dependent upon the good faith of the prosecution. In view of the district court's opinion in *United States v. Boyd*, 404 F. Supp. 413 (S.D.N.Y. 1975), that petitioner's immunized testimony touched on transactions which were before the Grand Jury; mentioned at least one person called as a witness at trial, in conjunction with other reasons raised before the Second Circuit,* a

* Petitioner noted the following to the Second Circuit in his brief to that court:

"On or about August 22, 1975, appellant's counsel received a letter from one of the assistant United States attorneys involved in the prosecution, which stated in pertinent part:

'Neither material contained in Referee Morton's findings and conclusions, nor that in the notes mentioned above (notes of appellant's testimony in the bankruptcy proceedings), is in any instance new to us, and we hereby represent that all the evidence to be used against Mr. Mullenax in the trial of this case comes from sources independent of those notes,

[Footnote continued on following page]

hearing was warranted. Otherwise, the protections meant to be secured by the Court in *Kastigar v. United States, supra*, 406 U.S. at 459-463, would be seriously diminished if not totally abrogated.

3. Respondent argues that the appropriate response to the jury's request for copies of the substantive statutes

findings and conclusions and is in no instance derived from them in any manner.'

[T]he other assistant United States Attorney, who was in charge of the prosecution, thereafter in an affidavit dated September 24, 1975, established that he was 'the assistant United States attorney who presented this case to the Grand Jury,' and that 'we are possessed (of a copy of Mullenax's bankruptcy testimony) but which we have never read.' Consequently, the trial court in denying *Kastigar* hearings left the following related issues open:

1) Even though not sufficient to negate the necessity of *Kastigar* hearings . . . [neither of the two Government attorneys] . . . proffered the representation that all the evidence used against appellant in the presentation of the case to the Grand Jury finding the instant indictment came from legitimate independent sources. Such representation was made with regard to the evidence to be used at trial. . . .

2) Even though the trial judge stated that . . . [the affidavit of the Government attorney in charge of the prosecution] . . . evidenced that 'no government attorney *read or* made use of that (Mullenax's bankruptcy) testimony', appellant was not afforded the opportunity to discover why the full transcript of Mullenax's bankruptcy testimony, possession of which by the Government was first revealed in . . . [the prosecutor's] . . . affidavit, was in the prosecution's hands in the first instance, and when and from whom it was received. Moreover, appellant was not afforded the right to discover whether Referee Morton's findings and conclusions dated and filed June 29, 1973, which make reference to appellant's bankruptcy testimony, was used in connection with the Grand Jury proceeding."

rested in the sound discretion of the trial court. It is submitted that the failure of the trial court to inform the jury that the language of the statutes did not embody all the critical and crucial elements of the offenses and reinstruct as to those elements clearly, under the facts in petitioner's case, was prejudicial error. Particularly so when petitioner's trial counsel specifically lodged objection to the trial court's submission of the statutes without reinstruction on the elements of knowledge, willfulness and intent. Specific intent was a critical element with reference to petitioner inasmuch as the allegations against him centered on alleged activity to defraud the banks and money lending institution. The securities counts were directly central to the question of whether petitioner was criminally implicated, and the pertinent substantive statutes totally lacked reference to the elements of knowledge, willfulness and intent. Petitioner's trial counsel feared that if the jury relied upon the wording of the statutes alone that petitioner would be severely prejudiced. The essence of his defense was that he was without requisite knowledge and intent. Counsel's request was appropriate and was made to assure proper consideration by the jury of the charges against petitioner and a fair trial. Moreover, respondent's position that Sections 1001, 1341 and 1343, Title 18, U.S.C. make partial reference to the requisite critical elements does not meet the issue. Moreover, it is pointed out in this regard that petitioner was acquitted of all counts charging him with violations of 18 U.S.C. § 1001.

4. Respondent argues that regardless of the fact that the court of appeals may have incorrectly determined not to remand petitioner's case to the sentencing court for reconsideration of sentence, in view of the reversal of forty-two of the fifty-one counts upon which he stood originally convicted, that petitioner has adequate relief in terms of a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

It is highly unlikely that a sentencing judge would properly consider or reduce a defendant's sentence when the appellate court states that remand for reconsideration was "neither necessary or appropriate". The stance of the appellate court would necessarily have a chilling effect on the sentencing judge. Any reduction of the sentence would be in clear contravention of the posture evidenced by the appellate court. In fact, petitioner did make a Rule 35 motion to the sentencing judge following the decision of the court of appeals. His application was in all respects denied.

CONCLUSION

For the reasons stated in our petition and this reply brief it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. EHRLICH,
MARC A. ROSENBERG,
Attorneys for Petitioner,
Office & P.O. Address,
200 Garden City Plaza,
Garden City, New York 11530.
Tel. No. 516-248-4300.

GO

GO

GO